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BEFORE THE

SURFACE TRANSPORTATION BOARD

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EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REBUTTAL COMMENTS OF BUNGE CORPORATION

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Dated: January 11, 2001

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Bunge Corporation ("Bunge") has participated in this proceeding by submitting Opening Comments in response to the Notice of Proposed Rulemaking ("NPR"). Our Opening Comments have been referred to by several railroads in their Reply Comments filed on December 18, 2000.

The entire thrust of Bunge's Opening Comments was to encourage the Board to not only retain the requirement, in the NPR, that merger applicants protect major gateways, but to strengthen that requirement.

In support of our position, Bunge pointed to its experience at its Emporia, KS soybean processing plant. Prior to the Burlington Northern Santa Fe merger, approximately 25 percent of Bunge's very substantial soybean meal output from that plant moved via Santa

Fe/Southern Pacific routes to destination markets on Southern Pacific. After the merger of Burlington Northern and Santa Fe was fully implemented, only one percent of Bunge's Emporia rail shipments of soybean meal continued to move to customers on the former Southern Pacific lines, now operated by Union Pacific. We pointed out that the BN-Santa Fe merger had in essence completely terminated the ability of Bunge's Emporia plant, served exclusively by Santa Fe prior to the merger and by BNSF after the merger, to market its products to any points other than those on the BNSF system.

BNSF obviously has all of the records necessary to challenge those assertions in our Opening Statement. It did not do so, knowing full well the accuracy of the facts that we set forth.

Indeed, rather than attempting to deny that its own post-merger policies have brought about market foreclosures, BNSF now agrees that there should be an "open gateway policy [that] must require that affected gateways be kept open on an operational and economic basis." BNSF Reply at 27. BNSF, however, opposes the formulation of an open gateway <u>rule</u> and instead favors the approach contained in the NPR -- a requirement that the merging carriers propose their own method of maintaining open gateways.

BNSF argues that a broad rule is inappropriate because each gateway condition must be tailored to specific facts in each merger case. BNSF Reply at 25-28. It is unclear, however, why specific facts are necessary to fashion a single appropriate gateway rule. For instance, in the case of Bunge's Emporia facility, a condition prohibiting the merged BNSF from foreclosing access by Bunge to its former Southern Pacific markets would have been appropriate. BNSF does not explain in its Reply Comments why such a condition must await a detailed factual demonstration or what facts would have to be proven. If traffic moved over a gateway pre-merger, those markets should be protected. A fact-intensive inquiry may be appropriate to enforce a gateway condition, but enforcement of a condition should not be confused with its imposition.

Two other railroads, Norfolk Southern and Union Pacific, also refer to Bunge's request that the Board's final rules contain effective market access conditions. Union Pacific regards Bunge's position as one which would "prohibit rate reductions" (UP Reply Comments at 15), and NS lumps Bunge in with a group of commentors said by NS to advocate "rate equality over competing routes" (NS Reply Comments at 12). Neither characterization is correct.

CSX similarly distorts Bunge's Opening Comments, claiming that we find "little good with respect to the Board's unrelated competitive enhancement proposal" (CSX Reply at 17), an assertion which is true only if one disregards the fact that our dissatisfaction is not with competitive enhancement, but with <u>underdefined</u> competitive enhancement.

For gateway conditions to be effective, they must do something more than require a mere physical interchange of traffic. Where there is an open interchange, a gateway obviously can be closed through rate actions or inactions just as effectively as if the switches were removed. Therefore, if the Board's merger rules are aimed at preserving or enhancing competitive opportunities for shippers in the form of continued market access, it is essential that gateways be maintained both operationally and economically.

On the other hand, there may be occasions when it is appropriate for a merged carrier to make post-merger rate adjustments over gateways. For example, a rate reduction from a gateway to an on-line destination may be necessary to retain existing traffic or to attract new traffic. Bunge believes that railroads should have the discretion to make such adjustments, gateway preservation conditions notwithstanding, where they serve a legitimate purpose. It is only those rate adjustments which have as their sole or primary goal the deterrence of traffic movements which should be prohibited.

The gateway conditions proposed by Bunge in our Opening Statement cannot realistically be read as being intended to bar those carrier rate actions in furtherance of legitimate pricing prerogatives, and carrier efforts to portray Bunge's suggestions otherwise are nothing but a debating technique. No railroad has indicated how it is possible to maintain an open gateway where, for example, rates abruptly are raised by hundreds of dollars per car solely on interline traffic. Such efforts cannot be viewed as anything other than market foreclosure steps, and Bunge believes that the Board's final rules should make it clear that mere market foreclosure by any means will be disfavored.

Bunge must reiterate its disagreement with a policy of allowing the applicant railroads unrestrained leeway in dealing with post-merger gateway access to markets. Union Pacific, by way of example, has made proposals which illustrate why such an approach would be counterproductive. UP argues that the proper solution to gateway access is to require a bottleneck rate to be quoted to a requesting shipper, and thereafter to allow that shipper to use the Board's bottleneck rate procedures if the rate is unsatisfactory. That approach would work but for the high rate invariably quoted by the carrier operating the bottleneck segment, leading to costly rate litigation, the prospect of which will deter gateway use..

To deter solutions, such as that offered by UP, which nullify gateway access, the Board should adopt final rules of the type proposed by Bunge in its Opening Statement. These rules would permit carriers to continue to enjoy rate flexibility except where its purpose is to bar market access. The Board should not be mislead by arguments suggesting that each merger case must await a particular set of facts before the Board takes a position on market access. Gateway conditions should be triggered by data demonstrating significant or essential gateway use. Upon such a showing, BNSF and others apparently would concede that gateway conditions of some sort then would become appropriate. The final rules should indicate what type of conditions will follow.

Bunge does not believe that any railroad has provided a sufficient basis for retention of the gateway approach set forth in the NPR, an approach which declines to spell out that gateway protection will be available on an economic basis. Virtually all segments of the shipping public have urged the Board to expand the NPR concept of gateway protection. Even most of the railroads agree that some form of economic protection is appropriate. The Board should act in its final rules to provide that expanded protection.

Respectfully submitted,

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Dated: January 11, 2001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served, by first class mail, postage prepaid, on all parties of record this 11th day of January 2001.

Darrell R. Wallace

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